STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-416

AVANGRID NETWORKS, INC., et al.,
Plaintiffs/Appellants

v.

BUREAU OF PARKS AND LANDS et al.,
Defendant- Appellees

On Report from Business and Consumer Court
Docket No. BCD-CV-2021-00058

BRIEF OF INTERVENOR-APPELLANT INDUSTRIAL ENERGY CONSUMER GROUP

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INTRODUCTION

American history teaches us what happens to democracy when the powers of government are not held separate. As the Supreme Court has explained, "[t]he Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which . . . had produced factional strife and partisan oppression." *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 219 (1995). Under these conditions democracy did not work well.

"[C]olonial assemblies and legislatures" would often "correct the judicial process through special bills or other enacted legislation," and "[i]t was common for such legislation not to prescribe a resolution of the dispute, but rather simply to set aside the judgment and order a new trial or appeal." *Id*. In response to this, a "sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution." *Id*. at 221. "Madison, Jefferson, and Hamilton each wrote of the factional disorders and disarray that the system of legislative equity had produced in the years before the framing; and each thought that the separation of the legislative from the judicial power in the new Constitution would cure them." *Id*.

The Maine Constitution too is based on the separation of powers. "Each of the three departments being independent . . . are severally supreme within their legitimate and appropriate sphere of action." *Ex parte Davis*, 41 Me. 38, 53 (1856). "All are limited by the constitution," and "[t]he legislature are powerless . . . to legislate in violation of, or inconsistent with, constitutional restraints." *Id.* Under the Maine Constitution, "if ever, the executive or legislative departments have exercised in any respect a power not conferred by the constitution, . . . the judiciary is not only permitted but compelled to sit in judgment upon such acts, and bound to pronounce them valid or otherwise." *Id*. at 53–54.

Such an occasion is before the Court now, and it is essential that the Court use it to draw a clear line: once a project has won the approval of the executive and judicial branches, pursuant to the process the legislative branch created, that decision cannot then be overturned by a citizen initiative. The alternative is to let the citizen initiative reign supreme over Maine's constitutional structure, and to tell potential future investors in the new energy infrastructure the climate crisis demands that in Maine, because retroactive citizen initiatives are always possible, final approvals are not really final. That would be a recipe for paralysis on the great challenge of our time.

The continued functioning of our democratic machinery requires that even if the people appear to have spoken, this Court has the final word on whether what they may have said is in fact a lawful exercise of their legislative power, and thus may be given the force of law. It falls to this Court to maintain the balance of our tripartite system. The Court should reject the contention that the legislative power—even when exercised by citizen initiative—somehow transcends the boundaries the Constitution draws. Indeed, special vigilance is warranted when the legislative power is exercised by citizen initiative, as the people acting directly may be less constrained by an understanding of the limitations imposed by the constitutional separation of powers than the legislature itself would be; the people acting directly do not have the institutional interest in ensuring that powers remain separate that the legislature has.

Even the people are bound by the Constitution; the work of the other branches does not simply disappear at their command unless the constitutional rules are adhered to. When constitutional lines are crossed, even by the people purporting to exercise the power of citizen initiative, democracy requires that this Court step in and put things right. The alternative is constitutional chaos.

STATEMENT OF THE FACTS

Industrial Energy Consumer Group ("IECG") intervened in the trial court in support of NECEC Transmission LLC ("NECEC LLC") and Avangrid Networks, Inc. ("Avangrid"). IECG represents Maine industrial energy consumers before state, regional, and federal regulators on energy-related issues, and is often adverse to Central Maine Power Company ("CMP") and its parent Avangrid on issues of electricity cost and reliability and on other policy matters. But because IECG accepts the consensus climate science and advocates for rapid and efficient climate mitigation, it has supported NECEC LLC, Avangrid, and the New England Clean Energy Connect transmission corridor project ("NECEC") in proceedings before the Maine Public Utilities Commission ("PUC"), Maine Department of Environmental Protection, and Maine Land Use Planning Commission.

If retroactive application of the second after-the-fact ballot initiative to overtly target NECEC (the "Initiative") is not enjoined, IECG's members, along with everyone else in Maine, will be deprived of the project's many benefits. These include the elimination of millions of tons of greenhouse gas emissions as part of the effort to combat climate change; the construction of a more reliable electric grid; cheaper electricity in the region; and direct benefits to Maine in the form of a 20-year agreement to sell enough discounted electricity

in the state to power approximately 70,000 homes or 10,000 businesses and save $40 million,[1] plus a package of nearly $250 million in benefits that includes $15 million for heat pumps, $15 million for electric vehicles, $50 million for low-income customers, and $140 million for ratepayer relief. *See* Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation, Docket No. 2017-00232, at 89 (Me. P.U.C. May 3, 2019); A. 267.

Beyond that, IECG adopts NECEC LLC and Avangrid's statement of the facts.

STATEMENT OF THE ISSUE

As applied retroactively to the NECEC project, the Initiative would directly overturn a Certificate of Public Convenience and Necessity ("CPCN") that was granted by the PUC and affirmed on appeal by this Court. Does this retroactive application of the Initiative to overturn this Court's final judgment violate the principle declared in *Grubb v. S.D. Warren Co*. that "[t]he Legislature may not disturb a decision rendered in a previous action, as to the parties to that action," 2003 ME 139, ¶ 11, 837 A.2d 117, and the strict separation of powers the Maine Constitution requires?

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[1] *See* https://www.maine.gov/governor/mills/news/governor-mills-secures-discounted-electricity-maine-hydro-quebec-2020-07-10.

SUMMARY OF THE ARGUMENT

Once an energy infrastructure project has won the approval of the executive and judicial branches, pursuant to the process the legislative branch created, that decision cannot then be overturned by citizen initiative. The separation-of-powers analysis here is controlled by *Grubb v. S.D. Warren Co*., where the Court held that "[t]he Legislature may not disturb a decision rendered in a previous action, as to the parties to that action . . . ." 2003 ME 139, ¶ 11, 837 A.2d 117, 121. *Grubb* makes clear that while the PUC's authority is derived from statute, that does not mean the legislative power extends to overturning its final decisions. Neither the Legislature nor the people acting by citizen initiative has the power to change the criteria for obtaining a Certificate of Public Convenience and Necessity, and then have the new criteria applied retroactively to a project that met the criteria that existed when it won a final agency approval that was affirmed by this Court. For a citizen initiative to have that effect would violate the separation-of-powers principle at the heart of the Maine Constitution.

Maine needs a regulatory system that encourages investment in energy infrastructure by ensuring that once a major project has received final approval under the prevailing rules it may in fact go forward. If such a project could later be stopped by a ballot initiative that retroactively changed the

rules under which it was approved, potential investors in the infrastructure Maine needs to deal with climate change will have good reason to steer clear of the state. That would spell disaster for our climate future.

If the Court determines that the portions of the Initiative that would overturn this Court's decision affirming the CPCN the PUC granted for the NECEC project are unconstitutional, it should further rule that the portion of the Initiative affecting leases issued by the Bureau of Parks and Public Land is not severable from the unconstitutional provisions, because the Court has previously ruled that the Secretary of State did not abuse her discretion in drafting the single ballot question that was the subject of the Initiative.

ARGUMENT

The trial court reported this case "for the Law Court to determine the questions of law presented in the Order before any further proceedings are taken." (A. 15.) "If the Law Court determines that allowing the Initiative to become law works a constitutional violation on any basis," the trial court wrote in its order denying the motion for preliminary injunction, "that determination would likely change the trajectory of the case," such that "staying the Initiative would be appropriate." (A. 18–19.) This brief addresses one way in which retroactive application of the Initiative to the NECEC project would work a constitutional violation: it would be contrary to the bedrock

constitutional principle of separation of powers. Retroactive application would also work an unconstitutional deprivation of NECEC LLC and Avangrid's vested rights, as argued in their brief, but the focus here is on separation of powers.

I. Retroactive application of the Initiative to NECEC would violate the separation of powers because the legislative power does not extend to overturning a decision that was made by an executive agency and affirmed by the judiciary.

Separation of powers is the constitutional foundation on which democracies are built. "That the legislative branch of government under our tripartite system is subject to restrictions upon its authority, created by constitutional provisions, and that it is one of the proper functions of this court to define the limits of legislative power, are principles too generally recognized to require the citation of authorities." *Inhabitants of Warren v. Norwood*, 138 Me. 180, 24 A.2d 229, 236 (1941). This form of judicial review goes back at least to 1825, when *Lewis v. Web* held that the Legislature does not have the power to "set aside a judgment or decree of a Judicial Court, and render it null and void." 3 Me. 326, 332 (1825). The principle stated in *Lewis* necessarily applies to a court decision affirming a final order of the PUC. *See id*. at 328–29 ("[T]he three great powers of government, the legislative, the

executive, and the judicial, should be preserved as distinct from, and independent of each other . . . .").

The principle of separation of powers on which *Lewis* is founded is "fundamental to our concept of democratic government." Harry P. Glassman, *Predicting What the Law Court Will Do in Fact*, 30 Me. L. Rev. 3, 5 (1978). "'Limitations [on legislative power] can be preserved in practice in no other way, than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.'" *Ex parte Davis,* 41 Me. at 52 (quoting Federalist, No. 78 (Hamilton)). This Court has made clear that "article III, section 2 of the Maine Constitution provides for a *strict* separation of powers between the three branches of government . . . ." *Bossie v. State*, 488 A.2d 477, 480 (Me. 1985) (emphasis added).

The separation-of-powers analysis with respect to retroactive application of the Initiative to NECEC is controlled by *Grubb v. S.D. Warren Co*., where the Court held that "[t]he Legislature may not disturb a decision rendered in a previous action, as to the parties to that action . . . ." 2003 ME 139, ¶ 11, 837 A.2d 117, 121; *see also State v. L.V.I. Grp*., 1997 ME 25, ¶ 11 n.4, 690 A.2d 960, 965 ("[A] final judgment in a case is a decisive declaration of the

rights between the parties, and the Legislature cannot disturb the decision . . . as to the parties in that action.”). Grubb had been awarded partial incapacity benefits for work-related injuries; his benefits were calculated by comparing his current earnings with his inflation-adjusted pre-injury earnings. *Id*. ¶ 2. On appeal, the hearing officer’s decision was vacated and the case remanded with instructions that the calculation be made by first comparing unadjusted wages and then applying the inflation factor to the difference. *Id*. ¶ 3. On remand, the hearing officer denied benefits on the ground that Grubb’s current earnings exceeded his unadjusted pre-injury earnings. *Id*. Grubb did not appeal that determination. *Id*.

The legislature then changed the law to require that the calculation be performed by starting with inflation-adjusted wages. *Id*. ¶ 4. Grubb proceeded to file a new petition seeking a new benefits determination based on the change in the law. *Id*. ¶ 5. The hearing officer found that he was entitled to benefits under the new law. *Id*.

This Court reversed. “While we have held that statutory amendments may be applied retroactively to alter an employee’s level of benefits for injuries predating those amendments,” the Court explained, “we have never held that an amendment may be applied to alter an employee’s level of benefits in cases when benefits *have been previously established by decree or a*

binding agreement in the absence of changed circumstances." *Id*. ¶ 10 (emphasis added). The Court made clear that the Legislature does not have the power to "change the result of a previous decision." *Id*. ¶ 11. "The Legislature may not disturb a decision rendered in a previous action, as to the parties to that action; to do so would violate the doctrine of separation of powers." *Id*. In support of its conclusion the Court cited article III, section 2 of the Maine Constitution:

> "No person or persons, belonging to one of [the legislature, executive, or judicial] departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." ME. CONST. art. III, § 2.

Id. ¶ 11 n. 7 (alteration in original).

The holding in *Grubb* applies with equal force in this case. That *Grubb* applies here is clear from *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, 237 A.3d 882, where the Court rejected the first attempt to overturn the Certificate of Public Convenience and Necessary the PUC had issued for the NECEC project and the decision upholding it in *NextEra Energy Res., LLC v. Maine Pub. Util. Comm'n*, 2020 ME 34, 227 A.3d 1117. In *Avangrid* the Court cited *Grubb*—in the context of the very same CPCN and Court decision at issue here—for the proposition that "[t]he Legislature may not disturb a decision rendered in a previous action, as to the parties to that action," because "to do

so would violate the doctrine of separation of powers." 2020 ME 109, ¶ 35, 237 A.3d 882, 894 (quotation marks omitted). If *Grubb* applied in *Avangrid*, it must apply here too, as the same CPCN that was at issue in *Avangrid* is at issue here.

Grubb dictates the outcome of this appeal. Just as "[t]he Workers Compensation Act is uniquely statutory," *Grubb*, 2003 ME 139 at ¶ 19 (Clifford, J., concurring in part and dissenting in part), so too is the PUC a statutory creation. *Grubb* makes clear that the fact that the PUC's authority is derived from statute does not mean that the Legislature has the power to overturn its final decisions. And if the Legislature does not have that power, neither do the people acting by citizen initiative.

It makes no difference to the separation-of-powers analysis that the PUC's power to regulate public utilities originated with the Legislature in the first instance, and *Auburn Water Dist. v. Public Utilities Commission*, 163 A.2d 743 (Me. 1960), is not to the contrary. In *Auburn Water*, the Legislature did not undo an action the PUC had taken in the exercise of its delegated power, as retroactive application of the Initiative to the NECEC project would do here. The Legislature had created the Auburn Water District by a legislative charter that prescribed that the annual charge for water service to the City of Auburn would be $3,000; decades later, the PUC sought to disregard the rate the

Legislature itself had established in the legislative charter, and to set rates instead based on its own view of what would be just and reasonable. The question before the Court was "whether the Commission [was] bound to accept the charge or rate" the Legislature had lawfully established in 1923. *Id*. at 744. The Court held that it was. "The Legislature may limit the power of its agent, the Commission, if it so pleases," and therefore the PUC "must accept the city water rate fixed by the Legislature . . . ." *Id*. at 745-46. That makes sense: if the Legislature sets a rate in the first instance, the PUC is bound by that rate. *Auburn Water* stands for the uncontroversial proposition that the PUC must follow the law when it acts, which is what happened here: the PUC acted under authority delegated by the Legislature, and this Court upheld its action. *Auburn Water* holds that the Legislature may set a rate prospectively in a charter, and in so doing bind the PUC to adhere to that rate; it does not hold that the Legislature may insert itself into a specific adjudicatory proceeding after the PUC has issued a final decision that has been upheld on appeal and require the opposite outcome, as retroactive application of the Initiative to the NECEC project would do.

As applied prospectively, the Initiative—despite having been crafted by its proponents specifically as a mechanism to kill the NECEC project, rather than as a serious exercise in making public policy to be applied going

forward—may be constitutional. But its retroactive application to reverse the PUC's approval of NECEC as affirmed by this Court is not. The Initiative purports to establish new criteria for obtaining a CPCN, something the Legislature could do going forward. But it does not have the power to change the criteria and then have the new criteria applied retroactively to a project that received a CPCN under the rules as they applied at the time the CPCN was issued and affirmed by this Court. The dispute over whether the NECEC project met the requirements for a CPCN was resolved by this Court's decision in *NextEra* affirming the PUC's decision to issue a CPCN. For the Legislature, or the people exercising legislative power, to reverse that final decision now would violate article III, section 2.

As the trial court acknowledged, the unmistakable intent of the Initiative was to overturn the PUC's approval of the NECEC project. *See* A. 52 ("NECEC objects to the Initiative as squarely targeting the Project and this Court cannot disagree that the Project was the impetus for and focus of the referendum."); *see also id.* ("Throughout their campaign, supporters of the Initiative consistently emphasized that voting for it would block the Project corridor. The advertising in support of the Initiative was so targeted that a voter would be forgiven for not realizing the law would have any effect *other* than obstructing the Project.") (emphasis in original). The trial court

dismissed concerns about the Initiative reversing a decision that had been made by the executive branch and affirmed by the judicial branch on the ground that, on its face, the Initiative does not specifically target NECEC. According to the trial court, "so long as the law itself is one of general applicability, it will not be invalidated for including its target in its effect." (A. 53.) But the question before the Court is not whether the Initiative should be invalidated in its entirety; the question is whether the Initiative may be applied retroactively to the NECEC project ("its target"). That is a question the trial court never really answered, beyond the reflection that it would somehow be "unjust to refuse, as a matter of course, to apply the new law to the perceived threat which inspired it." *Id*.

No one is suggesting that new laws cannot, "as a matter of course," be applied retroactively to the perceived threats that inspired them. The constitutional problem with applying the Initiative to the NECEC project is instead based on specific aspects of this particular situation that create a separation-of-powers problem: the fact that retroactive application here would have the effect of overturning a final decision made by an executive branch agency and affirmed by this Court. *See Grubb*, 2003 ME 139, ¶ 11 (new laws of general applicability may be applied retroactively, but not where the effect would be to change the outcome of a previous adjudication). As applied

retroactively to stop the NECEC project, the Initiative would achieve what this Court made clear in *Avangrid* is impermissible: it would, as its proponents unmistakably intended, "dictate the Commission's exercise of its quasi-judicial executive-agency function in a particular proceeding." *Avangrid*, 2020 ME 109, ¶ 35. It would "vitiate the Commission's fact-finding and adjudicatory function—an executive power conferred on the Commission by the Legislature," and "require the Commission to vacate and reverse a particular administrative decision the Commission had made." *Id*. These are things the Court has said the legislative branch does not have the power to do. The Court should not let NECEC's opponents get around its ruling in *Avangrid* by pretending to be doing something different here when the effect of the Initiative, if applied retroactively to NECEC, is exactly the same as what has been found to be unconstitutional before: it "directs the Commission, in exercising its executive adjudicatory powers, to reverse its findings and reach a different outcome in an already-adjudicated matter in violation of the constraints of article IV, part 3, section 18 of the Maine Constitution." *Avangrid*, 2020 ME 109, ¶ 36.

"When the people enact legislation by popular vote," they engage in the "exercise of their sovereign power to *legislate*." *League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996) (emphasis added). It is a bedrock

principle that a citizen initiative is a "means of exercising . . . legislative power" (*id*.), and that the initiative power "applies only to legislation, to the making of laws . . . . " *Moulton v. Scully*, 111 Me. 428, 89 A. 944, 953 (1914). While the Initiative constitutes legislation to the extent that it applies going forward, it does not constitute legislation as applied retroactively to stop the NECEC project. Overturning a final decision of the PUC that was affirmed by this Court is something the Constitution does not permit the voters, exercising their power to legislate, to do. *See Inhabitants of Warren*, 24 A.2d at 236 (1941) ("[I]t is one of the proper functions of this court to define the limits of legislative power . . . ."). That is because the legislative power does not extend to "set[ting] aside a judgment or decree of a Judicial Court, and render[ing] it null and void[.]" *Lewis*, 3 Me. at 332.

One reason the trial court offered for rejecting a separation-of-powers challenge to retroactive application of the Initiative to NECEC was that "[t]he mere fact that a law impacts a court decision does not equate to an exercise of judicial power." (A. 54.) There are two problems here. First, to say that the Initiative "impacts" this Court's decision affirming the issuance of a CPCN for the NECEC project is a rather significant understatement. The Initiative, if applied retroactivity, would reverse and erase that decision. Second, the case the trial court cites—*MacImage of Maine, LLC v. Androscoggin County* —was

about a situation where "the Legislature passes legislation that affects cases that are *pending* in the judicial system." 2012 ME 44, ¶ 27, 40 A.3d 975, 986 (emphasis added) (quotation marks omitted). Here we have legislation aimed at a case that was not pending when the Initiative passed, or even when the petitions for it were first circulated, but that ended with this Court's decision nearly two years ago in *NextEra*. While "constitutional separation of powers is not always undermined when the Legislature passes legislation that affects cases that are *pending* in the judicial system," *MacImage*, 2012 ME 44, ¶ 27 (emphasis added) (quotation marks omitted), legislation that reverses the outcome of cases that have concluded with a final judgment and flat-out erases their force and effect is a different story. *See Lewis*, 3 Me. at 332 (Legislature cannot "set aside a judgment or decree of a Judicial Court, and render it null and void[.]").

In the trial court's view, "[w]here a piece of legislation has wide effect and is an expression of public policy, it does not usurp the court's adjudicatory function." (A. 54.) But this standard is too vague to have real meaning. All legislation is an expression of some sort of public policy, and if "wide effect" were enough to justify retroactive application, *Grubb* would have come out the other way, as the rule at issue there did not impact Grubb alone, but instead applied to disability claimants generally. Even if the Initiative is understood as

having wide effect and being an expression of public policy, that does not change the fact that, if applied retroactively to the NECEC project, it would overturn a decision of the PUC that was affirmed on appeal by this Court. The relevant rule here is not one about wide effects or expressions of public policy; it is that "[t]he Legislature may not disturb a decision rendered in a previous action, as to the parties to that action . . . ." *Grubb*, 2003 ME 139, ¶ 11, 837 A.2d 117. The trial court seeks to avoid this issue by declaring that the Initiative "does not reverse or vacate a specific judicial decision" (A. 54)—but that is so only if the Initiative is not applied retroactively to the NECEC project.

According to the trial court, even with retroactive application, "[t]he Law Court's holding in *NextEra* stands." (A. 54.) In a certain technical sense that is true; the *NextEra* decision would "stand" as a ruling on the validity of the PUC's decision to issue a CPCN for the NECEC project under then-existing law. But the point of the proceedings that culminated in the *NextEra* decision, the reason why they matter, was to decide whether or not the public need found to exist by the PUC would in fact be met by the NECEC project. The PUC and then this Court decided that it would be. To dismiss the concern about retroactively overturning the effect of this Court's final decision on the ground

that the decision still "stands" misses the point of why agencies and courts issue decisions in the first place.

No one disputes that "[t]he broad purpose of the direct initiative is the encouragement of participatory democracy," and that "[b]y article 4, part third,] section 18 the people, as sovereign, have retaken unto themselves legislative power . . . ." *Avangrid*, 2020 ME 109, ¶ 15 (quotation marks omitted). It is also clear, however, that section 18 gives the people the right to legislate by direct initiative only "'if the constitutional conditions are satisfied.'" *Id*. (quoting *McGee v. Sec'y of State*, 2006 ME 50, ¶ 25, 896 A.2d 933, 941). This Court has found that article III, section 2 establishes a "strict" separation of powers between the three branches. *Bossie*, 488 A.2d at 480. It falls to the Court in cases like this one to enforce that separation. *See Inhabitants of Warren*, 24 A.2d at 236 ("[I]t is one of the proper functions of this court to define the limits of legislative power . . . ."). Adherence to the strict separation of powers the Constitution demands is a condition that must be satisfied for an initiative to be a lawful exercise in participatory democracy. As applied retroactively to NECEC, the Initiative is unconstitutional, and the Court should so rule.

II. The stakes here are high.

IECG has pushed back against opponents of the NECEC project who object to having electric infrastructure in their backyard while enjoying the extraordinary benefits electricity offers as a public good, and against opponents in the fossil fuel industry who seek to profit by preserving the status quo of skyrocketing electricity prices and continual emissions of greenhouse gases. Stopping NECEC would be a disastrous triumph of NIMBYism, funded by anti-competitive dark money, at an historical moment when investment in our capacity to transmit renewable electricity across great distances to consumers is urgently needed, and would further empower fossil fuel interests that seek to impair the capability of Maine's utility regulatory paradigm to replace fossil fuels with renewable electricity. These consequences would be antithetical to the public interest, a factor the trial court was required to weigh in ruling on the motion for preliminary injunction.

This case will decide whether Maine continues to have a regulatory system that encourages investment in energy infrastructure by ensuring that once a major project has received final approval under the prevailing rules it may in fact go forward. It is imperative to make clear that Maine's courts and constitution do not permit after-the-fact campaigns to derail previously

approved projects by establishing new rules to be applied retroactively to reverse the outcomes of administrative and judicial proceedings that have been litigated to a final conclusion. If an energy infrastructure project that receives the final approvals NECEC received, and then defeats one ballot initiative campaign seeking a retroactive change in law to undo those final approvals, can still be stopped by a *second* ballot initiative campaign that *again* seeks to retroactively change the law to overturn final administrative and judicial determinations that the project is in the public interest and may proceed, the prospects for securing the future investment that will be needed to upgrade Maine's energy infrastructure to deal with climate change will be bleak.

NECEC is a key element of beneficial electrification, the process of decarbonizing the economy by electrifying the heating and transportation sectors with an increasingly renewable electricity supply. As IECG has argued before the Legislature and the PUC, beneficial electrification is essential to achieving the deep reductions in greenhouse gas emissions that are necessary to combat climate change. That is because electricity is the only scalable resource that can efficiently and effectively power society with zero-carbon resources like hydro, solar and wind.

Getting this done will require many more new transmission lines as part of a massive expansion of the electric grid to ensure that electricity remains affordable and reliable. Allowing Maine's approval of NECEC to be retroactively reversed would be a big and possibly irreversible step backwards in the state's beneficial electrification efforts, and would constitute a powerful deterrent to potential investors in future energy infrastructure projects in the state. The former head of the Environmental Protection Agency in the George H.W. Bush administration has cautioned that this case could have implications for clean energy projects across the country. *See* William Reilly, "This Maine power struggle could portend trouble for energy projects nationwide," Washington Post, October 6, 2021[2] ("In Maine, a dispute over an electrical transmission line is raising the prospect of rewriting the government rules that allowed the project to go ahead—*after* those rules were fairly and legally applied. This effort to retroactively apply the revamped regulations could kill an important initiative, and, worse, if the gambit succeeds, it would set a terrible precedent nationwide.") (emphasis in original).

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[2] Available at https://www.washingtonpost.com/opinions/2021/10/06/this-maine-power-struggle-could-portend-trouble-energy-projects-nationwide/.

In granting the CPCN, the PUC determined that "the NECEC will provide environmental benefits by displacing fossil fuel generation in the region, and associated greenhouse gas (GHG) production . . . ." (Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation, Docket No. 2017-00232 (Me. PUC May 3, 2019) ("PUC Order") at 6.) The Department of Environmental Protection has found that "[c]limate change . . . is the single greatest threat to Maine's natural environment." *In re Cent. Me. Power Co., New England Clean Energy Connect*, L-27625-26-A-N, Findings of Fact and Order, at 105 (Me. DEP May 11, 2020); *see also* A. 266, ¶ 32(e). Rejecting the idea that the project would simply divert a fixed amount of renewable energy from Canada to New England, the PUC concluded that in fact "NECEC will result in significant incremental hydroelectric generation from existing and new resources in Québec and, therefore, will result in reductions in overall GHG emissions through corresponding reductions of fossil fuel generation (primarily natural gas) in the region." (PUC Order at 71; *see also id*. at 72 ("[T]he generation imported into New England over the NECEC is likely to be incremental at least to a large degree, and not, in any significant way, be simply diverted from other markets.").) NECEC would put excess renewable generating capacity to use.

In so doing, NECEC would address a real and impending risk to the regional electric grid. ISO-New England has warned that, as predicted under 19 of 23 scenarios the grid operator analyzed, ISO-New England would be required, without significant new power sources, to implement emergency actions such as rolling power brownouts and blackouts as soon as 2023. (ISO-New England, *Operational Fuel-Security Analysis* (January 17, 2018), at 49–54.) As public officials in Texas and other states have learned, we ignore such warnings at our peril. The PUC found that NECEC will enhance grid reliability, concluding that "the addition of this interconnection to Québec, and the substantial amounts of baseload hydroelectric energy it will enable, will enhance supply reliability and supply diversity in Maine and the region." (PUC Order at 39.) The PUC cited the Federal Energy Regulatory Commission's adoption of the ISO-NE's 2018 *Operational Fuel-Security Analysis*, emphasizing the study's conclusion that "over the next several decades, New England's power system will largely depend on the availability of two key elements"—one of which is "electricity imports from neighboring regions." *Id*. at 41 (quotation marks omitted).

Given the urgent need to expand our electricity infrastructure, opponents of new transmission projects must not be allowed—after existing legal processes for approving them have run their course and final decisions

have been made—to use the ballot initiative process to retroactively set up a new game, on a new playing field, with new rules under which NECEC cannot win. The decisionmaking process that evaluated and endorsed NECEC featured years of judicial and administrative proceedings with thousands of pages of testimony submitted and dozens of hearings held, and determinations made based on science, law, and logic. This decisionmaking process was created and overseen by the peoples' elected representatives. Retroactive application of the Initiative to the NECEC project, after it has been fully and finally approved by the executive and judicial branches and is in the process of being constructed, would contravene core separation-of-powers principles. The Court should not permit NECEC's opponents to continue playing games with Maine's regulatory paradigm and its climate future.

IECG's members, and anyone interested in pursuing energy infrastructure projects in Maine, depend on the integrity and finality of our regulatory and judicial processes to give them the security they need to make major investments in the state. Retroactive application of the Initiative to NECEC would set a dangerous precedent, one certain to discourage the future large-scale investments that beneficial electrification requires to achieve climate mitigation—not to mention any other important projects that require state-issued permits. This Court should decline the invitation to lock in the

disincentive to investing in and constructing renewable energy infrastructure projects in Maine that retroactive application of the Initiative to the NECEC project would create.

III. Section I of the Initiative is not severable from Sections IV and V.

If the Court determines that the portions of the Initiative that would overturn this Court's decision affirming the CPCN the PUC granted for the NECEC project (sections 4 & 5) are unconstitutional, it should further rule that the portion of the Initiative affecting leases issued by the Bureau of Parks and Public Land (section 1) is not severable from the unconstitutional provisions. The Court has previously ruled, with respect to this same Initiative, that the Secretary of State did not abuse her discretion in drafting "a single, concise ballot question describing the single Act that was circulated to the voters for signature and presented to the Legislature for enactment before being referred to referendum." *Caiazzo v. Sec'y of State*, 2021 ME 42, ¶ 27, 256 A.3d 260, 268. That analysis controls the severability question here.

The Secretary of State made her decision under 21-A M.R.S. § 906(6)(A)(3), which provides that, in determining whether an initiative comprises "more than one issue, each requiring a separate question," one of three considerations the Secretary is to weigh is whether "[t]he questions are

severable and can be enacted or rejected separately without negating the intent of the petitioners." The Court explained that "[r]equiring the Secretary of State to separate provisions of an initiative into multiple questions could infringe on the electors' right of direct initiative because splintering a single bill that was proposed to be presented for a yes-or-no vote into multiple pieces of legislation might be inconsistent with the intent of those who drafted or signed the petition." *Caiazzo*, 2021 ME 42, ¶ 24. Indeed it would be. The Initiative was put to the voters as a single piece of legislation, and respect for their intent demands that it rise or fall on that basis.

CONCLUSION

The Court should rule that retroactive application of the Initiative to the NECEC project would be unconstitutional because it would violate the separation of powers.

Dated at Portland, Maine this 16th day of February, 2022.

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CERTIFICATE OF SERVICE

I, Sigmund D. Schutz, Attorney for Industrial Energy Consumer Group, certify on February 16, 2022 I served (by agreement of counsel) the *Brief of Intervenor-Appellant Industrial Energy Consumer Group* to the attorneys listed below.

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